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No. _____

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Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

JACK ZACHARY, ET AL., *Petitioners,*

v.

ALLAN WILK, ROYAL PALMS MOBILE HOME PARK, LTD.,

A CALIFORNIA LIMITED PARTNERSHIP, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE

COURT OF APPEAL, FOURTH APPELLATE DISTRICT,

STATE OF CALIFORNIA

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May 14, 1986

140 pp

EDITOR'S NOTE

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QUESTIONS PRESENTED

1. Did the California Court of Appeal misinterpret federal law and the meaning of 28 U.S.C. § 1360, and thus violate the principals of federalism by concluding that Cathedral City may not apply its local rental ordinance to non-Indian landlords renting to non-Indian tenants on land leased from the Agua Caliente Tribe?

2. Did the California Court of Appeal violate this Court's and other courts' interpretation of Section 1360?

LIST OF PARTIES

The parties to the proceedings below were the Petitioners Jack Zachary, Anne Zachary, Maud Sermucks, Thelma Cain, and Bruce Fisher, and the Respondents Allan Wilk and Royal Palms Mobile Home Park Ltd., a California limited partnership.

The Respondents before this Court are Allan Wilk and Royal Palms Mobile Home Park, Ltd.

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ALLAN WILK, ROYAL PALMS MOBILE HOME PARK, LTD., A CALIFORNIA LIMITED PARTNERSHIP, Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL, FOURTH APPELLATE DISTRICT, STATE OF CALIFORNIA

Jack Zachary, Anne Zachary, Maud Sermucks, Thelma Cain and Bruce Fisher ("Petitioners") respectfully request that a writ of certiorari issue to review the judgment and opinion of the Court of Appeal for the Fourth Appellate District of the State of California, entered in the above-

captioned case on October 24, 1985, and modified on November 22, 1985.

OPINIONS BELOW

The opinion of the Court of Appeal for the Fourth Appellate District of the State of California is reported at 173 Cal.App.3d 754, and is reprinted in the appendix hereto at p. 1a, infra.

The Court of Appeal's opinion denying rehearing has not been published, and is reprinted in the appendix hereto at p. 36a.

The opinion of the California Supreme Court denying review has not been published, and is reprinted in the appendix hereto at p. 39a.

The opinion of the trial court also has not been published, and is reprinted at p. 41a of the appendix.*/

JURISDICTION

On May 23, 1983, Petitioners commenced this action in Superior Court for the County of Riverside, invoking the court's jurisdiction to issue declaratory judgments (California Code of Civil Procedure § 1060), and to enjoin violations of duly enacted municipal ordinances. Id., § 526. On January 12, 1984, the Indio Branch of the Superior Court (Slaughter, J.), granted Petitioners' request for preliminary injunctive relief. App. at 41a. On March 9, 1984, Respondents appealed that order, and on October 24, 1985, the California Court of Appeal

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*/All further citations to documents in the appendix are designated as "App. at ___."

for the Fourth Appellate District reversed the trial court. Id. at 35a. On November 22, 1985, the California Court of Appeal denied Petitioners' motion for rehearing (id. at 38a), and on February 13, 1986, the California Supreme Court denied Petitioners' petition for review. Id. at 39a.

This Court has jurisdiction to review the decision of the California Court of Appeal pursuant to 28 U.S.C. § 1257(3). That section provides for review by this Court "[b]y writ of certiorari . . . where any . . . right is claimed under the . . . statutes of . . . the United States." In this case, Respondents have claimed the protections of federal Indian Law in general and 28 U.S.C. § 1360 in particular to prohibit the exercise of municipal police power over non-Indian lease contracts.

The decision of the California Court of Appeal is final because the "record shows that the order of the appellate court has in fact fully adjudicated rights and [the] adjudication is not subject to further review by a state court." Department of Banking v. Pink, 317 U.S. 264, 268 (1942). In reversing the preliminary injunction, the Court of Appeal ruled as a matter of law that a local ordinance is preempted by federal Indian law. App. at 14a-23a. Petitioners' complaint for declaratory and permanent injunctive relief and for damages relies entirely on the validity of the ordinance. The California Supreme Court has declined to review the Court of Appeal's decision. Accordingly, there is "nothing more of substance to be decided in the trial court," Construction & General Laborers' Union v. Curry, 371 U.S. 542,

551 (1963), and the decision of the Court of Appeal is deemed final.

STATUTE INVOLVED

28 U.S.C. § 1360 provides:

> "(a) Each of the States listed in the following table shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed opposite the name of the State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State:

State of	Indian country affected
Alaska	All Indian country within the state
California	All Indian country within the State
Minnesota	All Indian country within the State, except the Red Lake Reservation
Nebraska	All Indian country within the State
Oregon	All Indian country within the State, except the Warm Springs Reservation
Wisconsin	All Indian country within the State

(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

(c) Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section.

STATEMENT OF THE CASE

This case concerns the rights of more than 800 largely elderly tenants of the Royal Palms Mobile Home Park ("Royal Palms") to protections of a

municipal ordinance regulating the rents charged for spaces upon which their mobile homes sit. In March 1983, the voters of Cathedral City, overwhelmingly enacted Ordinance No. 48, limiting rents to a percentage of the Consumer Price Index, and setting up procedures for adjustments in rents to assure a fair return for Park owners. App. at 4a-5a, 47a-50a. Though Petitioners (the lessees) and Respondents (the lessors) are non-Indians, the California Court of Appeal interpreted federal law and 28 U.S.C. § 1360 to preclude application of Cathedral City's ordinance simply because the land upon which Petitioners' homes sit is leased from Indian allottees. Id. at 23a. This interpretation violates principles of federalism by misconstruing federal law. This interpretation also wreaks havoc in the administration of municipal police powers. Under the

guise of "Indian rights" that are never intended to benefit limited partnerships like Royal Palms, a city has been prohibited from regulating the contractual relationship between a non-Indian landlord and its non-Indian tenants.*/

Federal law does not exempt non-Indians from municipal laws applied to them alone and independent of their relationship with Indians. The

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*/The Court should note that Petitioners are not the only individuals concerned about the enforceability of local laws. Cathedral City has defended a lawsuit filed against it in the United States District Court for the Central District of California (Juan Segundo, Jr., et al., v. City of Rancho Mirage, Case No. CV-82-4338-AAH (Mcx); Jean Chormicle Kapp, etc., et al. v. City of Cathedral City, etc., et al., Case No. CV-84-3678-AAH (Mcx)). In that case, the court held that the City could enforce its ordinance against a mobile home park similar to Royal Palms and that federal Indian rights were no bar. For the convenience of the Court, the federal court opinion is included in the Appendix at page 70a.

relationship between Petitioners and Respondents is determined by arms-length lease contracts. Id. at 44a. No Indians are party to that relationship nor are Indians or their representatives parties to this action. Id. at 44a-45a. The only relationship which this contract has to Indians is entirely attenuated. The land upon which Royal Palms is situated is held in trust by the Bureau of Indian Affairs ("BIA") for two Indian allottees. The Indian allottees are members of the Agua Caliente Band of Mission Indians and hold the virtual fee in the land subject only to the BIA's supervisory trust authority. Id. at 3a, 43a-44a. The BIA has exercised that authority by approving a separate contract between it (for the allottees) and Respondent Royal Palms. Under that contract, the allottees receive annual lump sum payments and a percentage of the gross rents received by Royal

Palms. Id. at 44a. This limited-term contract between Royal Palms and the allottees is not regulated at all by local law. Id. at 44a-45a, 55a-56a.

Petitioners commenced this action to enjoin Respondents from violating Ordinance No. 48. The Indio Branch of the Riverside Superior Court, recognizing that the lease relationship between Royal Palms and its tenants did not and could not involve "Indian use of Indian land," Santa Rosa Band of Indians v. Kings County, 532 F.2d 655, 658 (9th Cir. 1975), cert. denied, 429 U.S. 1038 (1977), and had no "subsistence" impact on the Agua Caliente Band itself, Montana v. United States, 450 U.S. 544, 566 (1981), held that the ordinance did not interfere with tribal sovereignty or tribal self-government. App. at 56a-62a. Thus, the trial court properly concluded that the matter was within

the municipal police power of Cathedral City and issued a preliminary injunction.

On October 24, 1985, the California Court of Appeal reversed that injunction, holding that Ordinance No. 48 could not be enforced because it is a local ordinance and Royal Palms is located on Indian land. Id. at 23a. In adopting this mechanistic approach, the Court of Appeal misapplied federal Indian law and erroneously read Section 1360. As a consequence, the Court of Appeal made Petitioners virtual wards of the federal government, forcing them to rely on the federal sovereign to respond to local concerns in which it has no interest.

As demonstrated below, the Court of Appeal's reasoning was erroneous and the resulting "federalization" of local authority over Royal Palms Mobile Home

Park utterly anomalous. The writ of certiorari should issue.

REASONS FOR GRANTING THE WRIT

I.

The California Court of Appeal's interpretation of federal law and 28 U.S.C. § 1360 violates principles of federalism and conflicts with this Court's decisions by wrongly preventing a municipality from applying its law to its citizens.

The centerpiece of this action is the Court of Appeal's interpretation of federal Indian law in general and 28 U.S.C. Section 1360 in particular. Relying on New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983), the appellate court asserted that this local regulation could not be applied to Indian land and, therefore, could not govern the relationship between Royal Palms and its non-Indian tenants. App. at 14a-16a. Asserting that Section 1360 provided the only possible exception to preemption in

this case, the state court then further held that Section 1360 does not apply to municipal ordinances. Id. at 16a-23a.

The Court of Appeal's conclusions are erroneous. Neither this Court nor federal appellate courts interpret federal Indian law or Section 1360 to disable municipalities from exercising their police powers over non-Indian citizens whenever Indian allottees own land within municipal boundaries. Local law could be preempted only if application of the law imperiled the subsistence or welfare of the tribe or usurped a traditional attribute of tribal self-government.*/

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*/Local law could also be preempted if it directly conflicted with an express federal statute. The Court of Appeal, however, did not have to reach this aspect of preemption. See App. at 34a. In any event, there is no federal regulation in conflict with the Ordinance at issue here. See App. at 44a-45a.

In New Mexico v. Mescalero, supra, this Court overturned the imposition of state hunting and fishing laws on the Mescalero Reservation. The state law was preempted, not because it was applied to non-Indians or Indian land, but rather because imposition of the state scheme would have permitted the state "to dictate the terms on which nonmembers are permitted to use the reservation's resources," and would have resulted in the "tribe [exercising] its authority over the reservation only at the sufferance of the state." 462 U.S. at 338.

In this case, there is no similar impact upon an Indian Tribe. Indeed, the Agua Caliente did not even intervene in the case and the BIA remains free to alter its contractual arrangements with Royal Palms. In short, Cathedral City dictates no terms to either the Tribe or the BIA.

Moreover, the regulation of the private contractual relationship between Petitioners and Respondents is not a traditional attribute of government power which the Tribe may exercise. The Court of Appeal apparently concluded that the regulation in question was a typical exercise of power otherwise reserved for the Tribe. App. at 21a-22a, 28a. That conclusion, however, assumes the Tribe has jurisdiction over non-Indians in all instances where traditional governmental functions are implicated. It does not.

In numerous cases upholding the imposition of taxes and licensing requirements on non-Indians acting within Indian country, this Court has clearly stated that such regulations are permissible absent a subsistence impact upon the tribe itself. See Rice v. Rehner, 463 U.S. 713, ___, n.7

(1983) (imposition of state licensing scheme on non-Indians acting on reservation not infringe tribal sovereignty); Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134 (1980) (imposition of sales taxes on non-Indian purchasers not infringe on tribal sovereignty); Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463 (1976) (imposition of non-discriminatory tax on non-Indian customers of Indian retailers not infringe on tribal sovereignty). In sum, despite the fact that the powers to tax and license are quintessential government powers, this Court has allowed states to exercise those powers over non-Indians acting on Indian reservations.

The Court of Appeal attempted to distinguish the so-called tax cases by claiming that in those cases the tribes

and the states exercised concurrent authority, while in this case the Tribe and the municipality cannot concurrently govern. App. at 32a-33a. The distinction is irrelevant as a matter of law. In Rice v. Rehner, supra, the licensing scheme precluded a competing tribal scheme, but the Court still upheld the state regulation. Moreover, the Tribe here could not adopt its own rent regulation scheme as applied to leases over which it has no authority. The Tribe cannot, and has not attempted, to claim authority over non-Indian leases.

Having falsely concluded that Ordinance No. 48 could not survive absent explicit Congressional approval, the Court of Appeal next asserted that Public Law 280 (28 U.S.C. § 1360) did not save the Ordinance. App. at 23a. This conclusion, of course, was also wrong because Section 1360 is not

applicable to this case as a threshhold matter of law.

Public Law 280 granted state courts limited jurisdiction "over civil causes of action between Indians or to which Indians are parties" in specifically listed areas of Indian country. Bryan v. Itasca County, 426 U.S. 373, 377 (1976). Section 4(b) of Public Law 280 (28 U.S.C. § 1360(b)) specifically warned, however, that:

> "Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty,agreement, or statute or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein."

As its text and the cases interpreting the law make plain, Section 1360 has no application to this case. The cases where parties have attempted to expand the scope of Section 1360 present issues in the context of Indian use of Indian land. In Bryan v. Itasca County, supra, for example, the county attempted to impose personal property taxes on an Indian resident of an Indian reservation. This Court explained that such an attempt in general ran afoul of plenary federal authority over Indian tribes (426 U.S. at 376-377), and that Section 1360 did not otherwise permit the county's tax. Id. at 377-391. The Bryan Court expressly noted, "[Section 1360(b)] in its entirety may be read as simply a reaffirmation of the existing reservation Indian-Federal Government relationship in all respects save the conferral of state court jurisdiction

to adjudicate private civil causes of action involving Indians." Id. at 391.

As noted above, the existing law reaffirmed by Section 1360 permitted application of municipal ordinances to non-Indian citizens subject to municipal police powers. See Thomas v. Gay, 169 U.S. 264 (1898); see also Rice v. Rehner, supra; Moe v. Confederated Salish & Kootenai Tribes, supra; Washington v. Confederated Tribes of Colville Indian Reservation, supra.

Thomas v. Gay, supra, is particularly instructive. In that case, the Territory of Oklahoma sought to tax cattle owned by non-Indians grazing on Indian land under a lease between the Indians and the non-Indian cattle owners. There, as here, the tax diminished the marketing advantage of Indian land by imposing a burden similar to that applied to grazers

using non-Indian land. Nevertheless, this Court upheld the tax because it was "obvious that a tax upon the cattle of the lessees is too remote to be deemed a tax upon the lands or privileges of the Indians." Id. at 273.

Conversely, in cases where federal Indian law has preempted state or local exercises of police power, this Court has carefully warned that the particular facts did not involve non-Indian conduct otherwise subject to State and local governance. For example, in McClanahan v. State Tax Comm'n of Arizona, 411 U.S. 164, 167-168, this Court explained:

> "It may be helpful to begin our discussion of the law applicable to this complex area with a brief statement of what this case does not involve. We are not . . . concerned with exertions of state sovereignty over non-Indians who undertake activity on Indian reservations."

The federal Courts of Appeals have adhered to a similar division in applying federal preemptive powers. In two cases misread by the Fourth District Court of Appeal, Santa Rosa Band of Indians v. Kings County, supra, and United States v. County of Humboldt, 615 F.2d 1260 (9th Cir. 1980), the facts clearly involved attempts by local governing bodies to regulate "Indian use of Indian land." Santa Rosa, supra, 532 F.2d at 658. In both cases, California counties sought to impose their building codes on Indian housing construction projects located on tribal land. In both cases, therefore, the ordinances ran afoul of exclusive federal authority over Indian activities taking place on Indian trust property. Similarly, in each case, Section 1360 could not be used to reclaim what pre-existing federal law had already declared to be beyond state authority.

In contrast to the events reviewed in Santa Rosa and Humboldt, when states or localities attempt to regulate non-Indians whose acts take place on Indian land, the regulation passes because it has no impact on tribal sovereignty or tribal self-government. Rice v. Rehner, supra; Washington v. Confederated Tribes of Colville Indian Reservation, supra. In the context of regulating non-Indians, this Court has stated that such an impact cannot be found unless the regulation "imperils the subsistence or welfare of the tribe." Montana v. United States, 450 U.S. 544, 566 (1981). Consistent with this view, even in cases where this Court has overturned regulation of non-Indians on bases other than tribal sovereignty, it has noted the substantial adverse impacts on the tribe. See, e.g., White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980) (direct contractual relationship

between a non-Indian logging company and White Mountain Apache Tribe, from which tribe derived 90% of its revenue).

Unlike cases in which this Court has found preemption, this case poses no problems for the coexistence of federal and local law. Neither federal Indian law nor Public Law 280 reach the situation at issue here: rent regulation voted by non-Indians to be imposed upon non-Indians. Hence, there is no federal interest in preventing the local law from applying.

Deference to local authority and local expertise is a fundamental tenet of our federalism. Rizzo v. Goode, 423 U.S. 362 (1976). In this case, the voters of Cathedral City have identified a local problem and fashioned a unique local remedy. Their sensitivity and expertise should be respected and Ordinance No. 48 enforced.

II.

The Decision of the California Court of Appeal creates severe problems of conflicting local jurisdiction, cripples local government, and raises important questions of federal law.

Review by this Court is also necessary given the major effects of the Court of Appeal's ruling. Put simply, the ruling not only grants favored Indian status to Royal Palms' non-Indian landlord, it also means that the tenants, also non-Indians, now live in a virtual no man's land--without the benefits of municipal legal protections and apparently subject to federal or tribal authority never intended to govern conduct between non-Indians. Paramount public policy interests dictate that federal Indian law not control operation of the Royal Palms Mobile Home Park or the rents its non-Indian landlord may charge its non-Indian tenants.

As a matter of federal law, BIA review and approval of the provisions of the long-term lease for the park land between the Royal Palms Investment Partnership and the Indian allottees is the sum total of the proper exercise of federal authority over the park. Yet, the Court of Appeal's opinion now apparently gives the Tribe power to regulate the relationship between a non-Indian landlord and non-Indian tenants whenever that relationship occurs on land held in trust for two allottees. The Tribe's lack of interest in this suit, in addition to its lack of pre-existing authority to regulate legal relationships between non-Indians, demonstrate the incorrectness of this decision.

Long ago, this Court recognized the serious policy implications of competing exercises of sovereign authority. In United States v.

Oklahoma Gas & Electric Co., 318 U.S. 206 (1943), Oklahoma had received permission to construct a highway through allotted Indian land. Oklahoma then granted a utility company the right to construct electric lines along the highway. While acknowledging the grant of permission to build the highway, the Secretary of Interior contended that the electric lines were impermissible. The Court rejected this claim, noting:

> "Oklahoma is spotted with restricted lands held in trust for Indian allottees. Complications and confusion would follow from applying to highways crossing or abutting such lands rules differing from those which obtain as to lands of non-Indians." United States v. Oklahoma Gas & Electric Co., supra, 318 U.S. at 211.

This Court's explanation is both sensible and consistent with the general policy of allotment. The purpose of the federal allotment policy (under which both the Kickapoo Indian

allottees in United States v. Oklahoma, supra, and the individual allottees here received their land) was Indians assimilation. See Cohen, Handbook of Federal Indian Law, pages 128-141 (1982); see also Northern Cheyenne Tribe v. Northern Cheyenne Defendant Class of Allottees, Heirs and Devisees, 505 F.2d 268 (9th Cir. 1974), rev'd on other grounds sub nom. Northern Cheyenne Tribe v. Hollowbreast, 425 U.S. 649 (1976) (land allotted to individual Indians gives individual virtual fee in the land, subject only to BIA trust oversight, and is no longer tribal land subject to tribal control); United States v. Oklahoma Gas & Electric Co., 127 F.2d 349, 354 (10th Cir. 1942), aff'd, 318 U.S. 206 (1943) (same).

Even after the general policy of allotment was changed in favor of revival of tribal government, tribes

were still given the option to continue the allotment system or to reorganize to obtain greater common tribal land holdings. (See Indian Reorganization Act of 1934 (48 Stat. 984).) The Agua Caliente chose to retain the allotment policy, undoubtedly because they benefited from their individual holdings in the lucrative Palm Springs area. Their choice, however, created precisely the checkerboard pattern of land holdings which existed in United States v. Oklahoma Gas & Electric Co., supra, and thus precisely the same need to avoid "complications and confusion."

Up until now, courts have studiously avoided serious conflict between Indian rights and local authority by adhering to the threshold test that federal preemption result only from direct local regulation of Indian conduct or from an impermissible impact on the subsistence and welfare

of the tribe. The California Court of Appeal has abandoned these tests and, as a result, no local ordinance regulating non-Indian conduct on Indian land is enforceable unless specifically adopted by the Secretary of Interior. App. at 23a, n.2.

This holding does not preserve tribal sovereignty. Rather, it means that the federal government must act as the municipal law giver with respect to non-Indian citizens of Cathedral City. The prospect of federal governance, however, is nonsensical. It would require that a distant sovereign immediately familiarize itself with the special needs of a small Southern California town and respond in a timely fashion to the myriad concerns currently (and appropriately) addressed by its City Council. These issues include problems of fire and police protection, sewage and waste disposal,

administration of schools and the thousands of other concerns addressed by local citizens on a regular basis. Moreover, to the extent the federal government ignores or rejects this role, the Court of Appeal subjects municipalities like Cathedral City, where individual allotments are interspersed with non-Indian fee lands, to the sovereignty of the Agua Caliente Band, not just with respect to Indian affairs, but with respect to legal relationships between non-Indians.

No court has endorsed such an extreme view of federal authority in the past and this Court should review and correct the present anomaly to avoid the manifest injustice that will result if it is allowed to stand. There are thousands of municipal ordinances that regulate various aspect of the lives of residents of those municipalities. With its decision

preventing that regulation whenever Indian land is involved--no matter how remote or non-existent the impact of the regulation upon Indians--the California state court has thrown into question the validity of those local ordinances. It has created a problem which is "beyond the academic or the episodic," Rice v. Sioux City Cemetery, 349 U.S. 70, 74 (1955). Not only are the citizens of Cathedral City affected, but so are all the citizens of every municipality in which Indians hold title to land. The error made by the California Court of Appeal about the meaning and reach of federal law is too great to stand uncorrected.

CONCLUSION

Given the public significance of this case, the conflict between the state court opinion and this Court's prior case law, and the harm which the

California state court's opinion does to principles of federalism, Petitioners respectfully request that this Court grant the petition for a writ of certiorari

DATED: May 14, 1986

Respectfully submitted,

O'DONNELL & GORDON
PIERCE O'DONNELL*

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Counsel for Petitioners

APPENDIX

CERTIFIED FOR PUBLICATION
Filed October 24, 1985

COURT OF APPEAL, FOURTH DISTRICT

SECOND DIVISION

STATE OF CALIFORNIA

JACK ZACHARY, et al.,	)	
	)	
Plaintiffs and Respondents,	)	E000976
	)	(Sup. Ct.
v.	)	No. Indio
	)	38252)
ALLAN WILK, et al.,	)	
	)	OPINION
Defendants and Appellants.	)	
	)	

APPEAL from the Superior Court of Riverside County. Warren E. Slaughter, Judge. Reversed.

Tuttle & Taylor Incorporated, Joseph R. Austin and Spurgeon E. Smith; Richard I. Roemer for Defendants and Appellants.

O'Donnell & Gordon, Pierce O'Donnell, George R. Hedges and

Cornelius P. McCarthy; Hirschi & Clark and Toni Tweedle Healy for Plaintiffs and Respondents.

This case presents the issue of whether a municipal rent control ordinance may be enforced against a non-Indian lessee of property held in trust by the United States Government for reservation Indians. More specifically, the Indio Branch of the Riverside Superior Court granted a preliminary injunction at the instance of the non-Indian tenants of Royal Palms, a mobile home park on Indian land in Cathedral City, prohibiting their non-Indian landlords Allan Wilk and Royal Palms Mobile Home Park, Ltd. (defendants) from imposing rent increases in excess of the amount permitted by the recently-enacted Cathedral City rent control ordinance. Defendants appealed, contending: (1) the ordinance is a local regulation

which cannot be applied to Indian lands; (2) the ordinance is preempted by the comprehensive federal scheme governing leases on Indian lands; and (3) the ordinance is prohibited because its provisions interfere with tribal self-government.

FACTS

Royal Palms is a mobile home park which is located on approxi- mately 40 acres of land in Cathedral City. The land is held in trust by the United States for two members of the Agua Caliente band of Cahuilla Indians. Defendants leased the land from the two owners in return for a minimum annual rental fee plus a percentage of the gross receipts from the operation of Royal Palms. The lease was entered into in 1980 and expires on or about December 31, 1989. Unless otherwise

indicated, the following events occurred in 1983.

On March 8, Ordinance No. 48 (the ordinance) was approved by a majority of the voters of Cathedral City. On March 15, the ordinance was adopted by the city council, with an effective date of March 25. The ordinance is entitled "AN ORDINANCE OF THE CITY OF CATHEDRAL CITY ESTABLISHING A MOBILEHOME FAIR PRACTICES COMMISSION," and provides in relevant part:

"Section 1. Definitions

. . . 'Maximum Rent Increase' --From the effective date of this ordinance . . . no mobilehome park owner of any mobilehome space covered by this ordinance shall request, demand or receive a rent increase in any twelve (12) month period in excess of three-fourths (3/4) of the increase in the cost of living as indicated in the

Consumer Price Index. No mobilehome park owner shall be entitled to more than one such rent increase in any twelve-month period. . . .

"Section 2. Applicability [¶] A. The provision of this ordinance shall apply to mobilehome parks located within Cathedral City and to those rental spaces in a mobilehome park which are located entirely within the Cathedral City limits."

The ordinance also provides for the establishment of a Mobilehomes Fair Practices Commission (the commission), for the purpose of hearing and determining, among other things, tenants' petitions for review of mobile home park owners' actions pursuant to the ordinance.

In apparent reliance on a legal opinion that the ordinance would not

apply to Indian land, on March 25 defendants informed the tenants of Royal Palms whose leases were due to expire on June 1 that there would be a rent increase of 12 percent per year as of June 1. (Defendants had imposed a similar increase the previous year, and it was that increase which had initiated the events culminating in the adoption of the ordinance.)

On April 20, a tenant of Royal Palms petitioned the commission to review defendants' proposed 12 percent rent increase. After a hearing, the commission determined that the increase violated the ordinance, in that the relevant Consumer Price Index increase was less than one percent. Defendants raised the federal preemption issue in the commission proceedings, and the commission abstained from ruling theron.

Thereupon five residents of Royal Palms filed an action against defendants on behalf of themselves and the other 845 residents of Royal Palms (plaintiffs) for a declaration or their rights under the ordinance, and for damages as provided in the ordinance. (As to damages, the ordinance recites: "If a mobilehome park owner demands, accepts, receives or retains any space rent payment in excess of the amounts permitted by this ordinance, residents may recover said sum from mobilehome park owner as actual damages, together with a civil penalty of $500.00 per violation, and reasonable attorney's fees as determined by a court of competent jurisdiction.") Plaintiffs' complaint also included several tort counts and one contract count.

Defendants removed the case to the federal district court, claiming that

the primary issue was that of federal preemption.[1/]

Plaintiffs moved to have the case remanded to state court, and their motion was granted on the basis that preemption as a defense was not ground for removal jurisdiction.

Plaintiffs then noticed a motion for a preliminary injunction and a temporary restraining order, seeking to prevent defendants from imposing a rent

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1/ In defendants' first amended answer to plaintiffs' complaint (the original answer is not in the record) defendants alleged as an affirmative defense that "The Fair Practices Ordinance cannot be applied to Royal Palms because Royal Palms is on Indian land and said Ordinance is, therefore, preempted by federal law (28 U.S.C. § 1360) governing the use and regulation of Indian lands."

increase greater that the increase permitted by the ordinance. Attached to plaintiffs' motion was a letter to the Director of the Bureau of Indian Affairs from each of the two owners of the land on which Royal Palms is located. Each of the letters recited in relevant part: "I. . . as co-landowner of the Royal Palms Mobile Home Park lands . . . wish to make it known that I concur with the provisions of the [ordinance]."

Defendants' opposition to plaintiffs' motion for a preliminary injunction and a temporary restraining order was accompanied by a declaration of Barbara Gonzales, the Chairman of the Tribal Council of the Agua Caliente Band. The declaration recited, in relevant part: "The following . . . states the official position of the Agua Caliente Band of Cahuilla Indians. . . . We reject the

attempted involuntary application of this law to our lands because the Fair Practices Ordinance, if applied to Indian trust lands would infringe on the Band's right to govern and manage the use of the lands of the Agua Caliente Indian Reservation. The Agua Caliente Band has, since 1977, applied its own comprehensive land use controls (i.e., general plan, zoning, building codes, etc.) to that portion of the trust lands of the Agua Caliente Indian Reservation located in Palm Springs. The Band is now in the process of doing so for the other portions of the reservations, including those trust lands located in Cathedral City. With regard to such lands in Cathedral City, the Tribal Council strongly opposes, and does not recognize, any effort of the City to limit the Band's authority to apply its own land use controls to trust lands. . . .

". . . Moreover, the Agua Caliente Band has determined not to enact any ordinance prohibiting rent control of leased reservation trust lands. We feel strongly that the Agua Caliente Band does not have to enact any such negative legislation prohibiting external rent control laws in order to prevent local non-Indian governments from attempting to regulate the use of our lands. This policy decision of the Agua Caliente Band not to enact any legislation controlling rents on Indian trust lands is sufficient exercise of our right of self-government to foreclose any attempt by local or state government to legislate in this area."

After a hearing on plaintiffs' motion, on November 9, the trial court granted the motion as to those plaintiffs who had not signed leases before the effective date of the ordinance. Defendants were enjoined

from imposing rent increases at Royal Palms in excess of the amount permitted by the ordinance, and from engaging in any retaliatory acts against the resident of Royal Palms pursuant to the ordinance.

As to the preemption issue, the court's amended statement of decision of January 12, 1984, recited in relevant part: "The Court rejects Defendants' assertion of federal preemption of the . . . [ordinance] because Royal Palms is located on land owned by Indian Allottees. The contractual relationship regulated by the Ordinance is the lease relationship between the non-Indian Defendant-landlords and their non-Indian Plaintiff-tenants . . . a separate agreement exists between the Defendants and the Indian Allottees under which the Defendants use the land. . . . While the assignment is

regulated by federal law insofar as its terms are subject to approval by the Bureau of Indian Affairs, the lease relationship regulated by the Ordinance is not [¶] The Court finds . . . that there is no interference with, much less intrusion upon, tribal government in this case. The Agua Caliente Tribe cannot claim any direct or indirect contractual or economic interest in the application of the [ordinance] to Royal Palms. . . .

"Tribal government could be implicated in this case only if the Tribe itself claimed that imposition of the Ordinance to Royal Palms somehow imperiled 'the subsistence or welfare of the tribe.' [Citations.] The Court finds, however, that no such claim could be made in this case. The Allottees . . . receive a return on their land under terms of an assignment which has already been approved by the

BIA. The Ordinance has no 'subsistence' effect on the tribe itself."

DISCUSSION

Defendants contend first that local regulations such as the Ordinance cannot be applied to or enforced on Indian lands. We agree.

"'Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory.' [Citations.] Because of their sovereign status, tribes and their reservation lands are insulated in some respects by an 'historical immunity from state and local control,' [citation]." (New Mexico v. Mescalero Apache Tribe (1983) __ U.S. __, __ [103 S.Ct. 2378, 2385, emphasis added.] "[B]oth the tribes and the Federal Government are

firmly committed to the goal of promoting tribal self-government. . . . [A]s a necessary implication of this broad federal commitment, we have held that tribes have the power to manage the use of its [sic] territory and resources by both members and non-members, [citations], [and] to undertake and regulate economic activity within the reservation, [citation]." Id., at pp. 2386-2387, emphasis added.)

"'[A]bsent governing Acts of Congress,' a State may not act in a manner that 'infringed on the right of reservation Indians to make their own laws and be ruled by them.' [Citations.]" New Mexico v. Mescalero Apache Tribe, supra, __ U.S. __, __ [103 S.Ct. 2378, 2385.] "While under some circumstances a state may exercise concurrent jurisdiction over non-Indians acting on tribal reservations

citations], such authority may be asserted only if not preempted by the operation of federal law. [Id.] The exercise of State authority which imposes additional burdens on a tribal enterprise must ordinarily be justified by functions or services performed by the State in connection with the on-reservation activity." (Id., at p. 2387.))

The federal statute per- mitting states to exercise civil and criminal jurisdiction over Indian tribes is Public Law 280, 28 U.S.C. section 1360. Public Law 280 provides in relevant part:

"§ 1360 . . . "(a) Each of the States listed in the following table shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed

opposite the name of the State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State: . . .

"California" . . . All Indian country within the State. . . .

"(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner

inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

"(c) Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section."

In 1972, the United States District Court for the Central District of California held that Public Law 280 applied to cities and counties as well

as to states, and that Palm Springs could enforce its zoning ordinances on Indian lands within its territory. (Agua Caliente Band, etc. v. City of Palm Springs (C.D. Cal. 1972), 347 F. Supp. 42.) On January 24, 1975, the Ninth Circuit vacated Agua Caliente in an unpublished order. (Capitan Grande Band of Mis. Indians v. Helix Irr. Dist. (9th Cir. 1975) 514 F.2d 465, 468, fn. 3.)

Later that same year, in Santa Rosa Band of Indians v. Kings County (9th Cir. 1975) 532 F.2d 655, the Ninth Circuit held, as a matter of first impression, that the permissive provisions of Public Law 280 did not apply to local regulations, and refused to allow Kings County to enforce its zoning ordinance and building code against two mobile homes which were located on the Santa Rosa Band's reservation and owned by two

members of the Band. The court analyzed the legislative history of Public Law 280, and concluded that "[a] construction of P.L. 280 conferring jurisdiction to local county and municipal governments would significantly undermine, if not destroy . . . tribal self-government. By transferring regulation of all matters of local concern to local governments, the tribal government would be left little of no scope to operate. We think it more plausible that Congress had in mind a distribution of jurisdiction which would make the tribal government over the reservation more or less the equivalent of a county or local government in other areas within the state, empowered, subject to the paramount provisions of state law, to regulate matters of local concern within the area of its jurisdiction." (Id., at pp. 662-663.)

The Santa Rosa court also reasoned that "Indians, who do not own the fee to reservation lands, are unable under many state laws to incorporate reservation lands in order to acquire law-making powers. See Cal. Gov't Code § 34301 (West Supp. 1974). Thus [to interpret Public Law 280 as applying to local regulations] would not only ascribe to Congress the intent substantially to strip Indian tribes of their sphere of self-regulation, but also to leave them in the unequal position of being unable to obtain the measure of self-determination provided by strate laws to its other citizens." (Santa Rosa Band of Indians v. Kings County, supra, 532 F.2d 655, 663.)

The following year the United States Supreme Court cited Santa Rosa with apparent approval in Bryan v. Itasca County (1976) 425 U.S. 373, and stated that "nothing in [the]

legislative history [of Public Law 280] remotely suggests that Congress meant the Act's extension of civil jurisdiction to the States should result in the undermining or destruction of such tribal governments as did exist and a conversion of the affected tribes into little more than '"private, voluntary organizations"' [citation]." (Id., at p. 388.) (Bryan held that Public Law 280 did not give the State of Minnesota authority to tax Indian personal property situated on a tribal reservation.)

Four years later, in United States v. County of Humboldt (9th Cir. 1980) 615 F.2d 1260, the Ninth Circuit relied upon Santa Rosa to hold that Humboldt County could not enforce its zoning and building codes against four Indian construction projects on the Hoopa Valley Reservation. In response to Humboldt County's request that Santa

Rosa be overruled, the court said that it "continue[d] to believe that Santa Rosa was correctly decided." (Id., at p. 1261.)

In view of all the above, and finding no authority to the contrary, we are persuaded that the foregoing holding in Santa Rosa applies to and controls this case. We therefore hold that the Cathedral City rent control ordinance at issue cannot be enforced against Royal Palms, because the ordinance is a local regulation and Royal Palms is on Indian land.[2/]

2/ We do not hold that no local regulation may ever be enforced in regard to any activity on Indian property. "The intention of the federal government expressed in the Code of Federal Regulations contemplates control by both the state and local governments of the activities on Indian lands through laws and ordinances whenever the Secretary of the Interior adopts and makes those laws and ordinances applicable to Indian property." (County of San Bernardino v. La Mar (1969) 271 Cal.App.

(Continued on following page.)

Plaintiffs attempt to distinguish Santa Rosa and Humboldt on the grounds that those cases involved Indian use of Indian lands, whereas this case involves only non-Indian relations which "happen to take place" on Indian land, and only indirectly and incidentally affect the land and the Indian owners' interest therein. We disagree, for the following reasons.

First, the crucial feature of the Santa Rosa holding, as expressed by the Ninth Circuit in Humboldt, was the Indian character of the land, and not its users ("[In Santa Rosa we] held

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2/(Continued from preceding page): 2d 718, 723, emphasis added.) (See also City of Sault Ste. Marie, Mich. v. Andrus (D.C. 1980), 532 F.Supp. 157: "It has long been the position of the Department of the Interior that municipal land use laws may not be enforced on tribal trust lands except as permitted by the Secretary." (Id., at p. 165, emphasis added.)) The record here reveals no action by the Secretary of the Interior in regard to this ordinance.

that Kings County was without jurisdiction to enforce its zoning ordinance or building code on Indian reservation trust lands, and that Pub. L. 280, 28 U.S.C. § 1360, did not grant the county jurisdiction to do so.") (United States v. County of Humboldt, supra, 615 F.2d 1260, 1261, emphasis added.) Moreover, the U.S. Supreme Court "has repeatedly emphasized that there is a significant geographical component to tribal sovereignty, a component which remains highly relevant to the pre-emption inquiry. . . . '"The cases in this Court have consistently guarded the authority of Indian governments over their reservations."' [Citations.]" (White Mountain Apache Tribe v. Bracker (1980) 449 U.S. 136, 151.) (In White Mountain, the Court held that the State of Arizona could not apply its motor carrier license and use fuel taxes to two non-Indian corporations operating on an Indian reservation.)

Second, plaintiffs attempt to minimize the ordinance's effect on the Band's sovereignty by claiming that the ordinance affects only non-Indian relationships which just "happen to take place" on Indian land is disingenuous.

"California has no state rent control statute." (Birkenfeld v. City of Berkeley (1976) 17 Cal.3d 129, 141.) The regulation of rents is a valid exercise of municipal police power. (Id., at pp. 140-147.) In this case, the official position of the Band, as expressed by Barbara Gonzales, supra, was that it was in the process of applying its own "comprehensive land use controls" to its land in Cathedral City, and that it did not want a local, non-Indian government to regulate rents on "our lands." (Emphasis added.)

Plaintiffs attempt to discount the effect of Gonzales' declaration by claiming that: (1) the declaration does not contain a magic formula that the ordinance would "imperil the subsistence or welfare of the tribe," and (2) the fact that the Indian owners did not oppose the ordinance is the "best evidence" that the impact of the ordinance on Indians is "minimal." However, as to the "subsistence or welfare" test, it was applied in Montana v. United States (1981) 450 U.S. 544 to a state's authority to regulate hunting and fishing on Indian land by non-Indians who had not entered into "any agreements or dealings with the [Indian owners of the land] so as to subject themselves to tribal civil jurisdiction." (Id., at p. 566, emphasis added.) This is not such a case, and the Montana test was improperly applied here by the trial court. Moroever, claiming that a state

test should be applied to a local regulation, plaintiffs are ignoring Santa Rosa's holding to the effect that when a local regulation is applied to Indian lands, it is the form (i.e., local nature) of the regulation rather than its content which interferes with the Indians' sovereignty. (Significantly, there is no reference in the trial court's Amended Statement of Decision to the effect of the ordinance, as a local regulation, on tribal government.) Also, although we need not decide the issue, in view of the Supreme Court's statement in Montana that "A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements" (id., at p. 565), the ordinance may be inapplicable to

Royal Palms on the basis of its content as well as its form.

Further, the fact that the Indian owners of the Royal Palms land did not oppose the ordinance is irrelevant to the sovereignty issue, because those owners had no authority to speak on behalf of the Band. Moreover, Gonzales, who had such authority, stated in her declaration that "it is a policy of the Band to permit the individual Indian allottee to exercise her or his own discretion with respect to the economic return the individual allottee desires from the land. [¶] This policy of deference does not, however, extend to external actions such as the Fair Practices Ordinance adopted on March 8, 1983, by the voters of Cathedral City."

At oral argument, in response to a question from the panel, plaintiffs

contended that the Band did not have the authority to impose rent control regulations on land allotted to individual Indians, as opposed to land allotted to the tribe. Defendants disputed this contention. We asked the parties to submit supplemental briefs on the issue, and they have done so.

We find no support in plaintiffs' supplemental brief for their claim that the Band's authority does not extend to land held by individual allottees. Plaintiffs rely principally on Northern Cheyenne Tribe v. Northern Cheyenne, etc. (9th Cir. 1974) 505 F.2d 268, where the court held that the tribe had no equitable interest in mineral deposits in reservation land which had been allocated to individual members of the tribe. However, Northern Cheyenne Tribe was reversed by the United States Supreme Court on precisely that issue

in Northern Cheyenne Tribe v. Hollowbreast (1976) 425 U.S. 649. Moreover, neither the Ninth Circuit opinion in Northern Cheyenne Tribe nor any other authority cited by plaintiffs addressed the issue of whether a tribe could exercise sovereignty over land allotted to its members.

Finally, the local regulations which were precluded in Santa Rosa, supra, had been applied to land owned by individual allottees, and, in its reasoning, the court did not distinguish between tribal and individually-owned land ("Congress did not contemplate immediate transfer to local governments of civil regulatory control over reservations. . . . Congress had in mind a distribution of jurisdiction which would make the tribal government over the reservation more or less the equivalent of a county or local government in other areas within the

state.") (Santa Rosa Band of Indians v. Kings County, supra, 532 F.2d 655, 662-663, emphasis added.)

Otherwise plaintiffs rely on Aqua Caliente Band of Mission Ind. v. County of Riverside (9th Cir. 1971) 442 F.2d 1184 and Fort Mojave Tribe v. San Bernardino County (9th Cir. 1976) 543 F.2d 1253, where the Ninth Circuit held that California's possessory interest tax could be imposed on non-Indian lessees of Indian lands. However, the case before us here is neither a state regulation nor a taxation case. Moreover, on the sovereignty issue, the Fort Mojave court concluded that the imposition of the state tax would not impair the ability of the tribe to impose its own tax, because the taxes would be imposed "by two different and distinct taxing authorities." (Id., at p. 1258) (See also this court's decision in Palm Springs Spa, Inc. v.

County of Riverside (1971) 10 Cal.App. 3d 372, where Justice Gardner wrote: [P]laintiff asserts that the imposition of the possessory interest tax in the instant case constitutes an infringement on the sovereignty of the Agua Caliente Band of Mission Indians, which proposes to levy a 2 percent tribal tax on plaintiff. . . . In a federal system of dual sovereignties, it is common for multiple authorities to impose taxes on a single source of revenue, be it an income, a sales transaction, or a parcel or property. Consequently, it is not uncommon for similar sources of revenue to be taxed at varying rates. We perceive no infringement of the tribal sovereignty." (Id., at pp. 379-380.))

In this case, however, the imposition of Cathedral City's rent control ordinance would preclude the tribe from either imposing its own rent

control ordinance on defendants, or refusing to subject any of the tribes' leased property to rent controls of any kind. Such a situation would not be one of dual sovereignty or multiple authority, but one on which the reservation would be nothing more than a "tax-free [piece] of property, totally subject to regulation by local government entities as well as the state." (Goldberg, Public Law 280: The Limits of State Jurisdiction Over Reservation Indians (1974-1975) 22 U.C.L.A. L.Rev. 535, 581.)

In view of our decision that the ordinance is unenforceable as a local regulation, we need not address defendants' contentions that the ordinance is otherwise unenforceable because it is preempted by comprehensive federal regulations governing the leasing of Indian lands, or because

its provisions interfere with tribal self-government.

DISPOSITION

The trial court's order of January 12, 1984, granting plaintiffs' application for a preliminary injunction is reversed.

CERTIFIED FOR PUBLICATION.

/s/ McDaniel
J.

We concur:

/s/ Kaufman
Acting P.J.

/s/ Rickles
J.

CERTIFIED FOR PUBLICATION
Filed November 22, 1985

COURT OF APPEAL, FOURTH DISTRICT

SECOND DIVISION

STATE OF CALIFORNIA

JACK ZACHARY, et al.,	
Plaintiffs and Respondents,	E000976
v.	(Sup. Ct. No. Indio 38252)
ALLAN WILK, et al.,	
Defendants and Appellants.	MODIFICATION OF OPINION AND DENIAL OF PETITION FOR REHEARING

MODIFICATION of the opinion heretofore filed in this case on October 24, 1985, is made as follows:

On page 18, after the first full paragraph and just before the

Disposition, please add the following language.

After we filed our opinion, plaintiffs petitioned for rehearing, contending for the first time that the appeal is moot. In support of this contention plaintiffs claim that on January 14, 1984, about two months before the appeal was filed, the Band "formally adopted" the Ordinance by agreeing with Cathedral City to apply all its land use regulations to the Indian lands within the city. However, plaintiffs' contention that there is no longer an "'actual controversy'" (Paul v. Milk Depots, Inc. (1964) 62 Cal.2d 129, 132) as to the application of the Ordinance to Indian land is meritless, in view of the fact that over a year after the foregoing agreement, the Band and Cathedral City were still litigating the issue in federal district court (Kapp, etc. et al., v.

City of Cathedral City, etc., et al. (1984) C.D. Cal., No. CV 84-3678 AAH (Mcx)).

* * * * *

Except for the modifications of the language hereinabove set forth, the opinion previously filed remains unchanged.

The petition for rehearing is denied.

CERTIFIED FOR PUBLICATION.

/s/ McDaniel
J.

We concur:

/s/ Kaufman
Acting P.J.

/s/ Rickles
J.

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING

SAN FRANCISCO, CALIFORNIA 94102

FEB 13 1986

I have this day filed Order _____

REVIEW DENIED

In re: 4 Civil *No.* E000976

Jack Zachary, et al.

vs.

Allan Wilk, et al.

Respectfully,

Clerk

-877 8-82 4M • OSP

Cornelius P. McCarthy
619 S. Olive St., Suite 300
Los Angeles, CA 90014

Filed January 12, 1984

IN THE SUPERIOR COURT OF
THE STATE OF CALIFORNIA
COUNTY OF RIVERSIDE

JACK ZACHARY, ANNE ZACHARY, MAUD SERMUKS, THELMA CAIN and BRUCE FISHER, on behalf of themselves and all others similarly situated,	Case No. Indio 38252
v.	AMENDED STATEMENT OF DECISION RE: PRELIMINARY INJUNCTION; ORDER THEREON
ALLAN WILK, ROYAL PALMS MOBILE HOME PARK, LTD., A California Limited Partnership, DOES I through XX,	
Defendants.	

On October 28, 1983 at 9:00 a.m. in Department E of the above-entitled Court, Plaintiffs' Motion for Preliminary Injunction came on for hearing, the Honorable Warren E. Slaughter, presiding. After hearing on the merits, and the Court having read and considered all documents and files in this action and evidence by declaration or otherwise presented

thereon, this Court hereby renders its Statement of Decision and Order:

1. Plaintiffs Jack Zachary, Anne Zachary, Maud Sermuks, Thelma Cain, and Bruce Fisher have filed this action on behalf of themselves and all others similarly situated. The Plaintiffs in this action and the members of the class they represent ("residents" or "Plaintiffs") are non-Indian residents of Royal Palms Mobile Home Park ("Royal Palms"). The Defendants in this action are the owners of Royal Palms, Royal Palms Mobile Home Park, Ltd., a Beverly Hills investment partnership which is controlled by Defendant Allan Wilk, its General Partner ("Defendants"). The Defendants are all non-Indians.

2. Royal Palms is located in the City of Cathedral City, California and has available 497 ground spaces for

mobilehomes, approximately 459 of which are leased by Defendants for residential purposes and are the subject of this litigation. Residents of Royal Palms lease ground space from the Defendants on which residents place mobile homes which they own. Rent is paid on a monthly basis pursuant to lease agreements which are either month-to-month tenancies or three-year leases (collectively referred to as "leases" unless otherwise indicated) between the Defendants and individual residents and includes utilities and certain other services.

3. The land on which Royal Palms is located is owned by Ruth Elaine Patencio and Debrah Gonzales Purnel ("the Indian Allottees") who are members of the Agua Caliente Band of Cahuilla Indians. The Indian Allottees hold the land in fee subject to a trust relationship with the United States

Government through its agent, the Department of the Interior, Bureau of Indian Affairs ("BIA").

4. The Indian Allottees have entered into a long-term assignment of the land on which Royal Palms is located with the Defendants ("the Assignment") for purposes of Defendants' operation of Royal Palms. The Assignment was entered into in 1980, and provides that, for a period of at least nine years, the Defendants may operate Royal Palms subject to payments to the Indian Allottees made on the basis of a minimum annual lump-sum payment and a percentage of gross receipts from the operation of Royal Palms. The Assignment was reviewed and approved by the BIA in accordance with the BIA's obligations under federal law as trustees of the Indian Allottees. The Indian Allottees and the BIA do not own, or maintain any control over, or

participate in the operation of, Royal Palms. The Indian Allottees and the BIA do not approve, authorize, or negotiate the leases entered into between the Defendants and the Plaintiffs, and the legal relationship represented in the leases is exclusively between the Plaintiffs and the Defendants subject to California law.

5. Since the Defendants assumed control of Royal Palms in 1979, they have increased rent annually at a rate of 12% per annum for a compound increase over the past three years of over 40%. As of June 1983, of the 421 spaces available for residential lease at Royal Palms, only two spaces were vacant, representing a vacancy rate of only 0.47%.

6. In March of 1982, the Defendants announced a rent increase in

the amount of 12% per annum to residents whose three-year leases were about to expire. At about this same time, an initiative drive began in Cathedral City to establish a Mobilehome Fair Practices Ordinance and a Mobilehome Fair Practices Commission to impose a ceiling on maximum allowable rent increases in mobilehome parks in Cathedral City. Upon learning of the initiative drive for the Mobilehome Fair Practices Ordinance, the Defendants stated in a letter to all Royal Palms residents, dated May 12, 1982, that the Defendants would oppose enforcement of the Ordinance and threatened that the legal fees for such opposition would be passed on to residents of Royal Palms.

7. The Mobilehome Fair Practices Ordinance ("the Ordinance") was placed on the ballot by petition, and on March 8, 1983, 81% of the voters of Cathedral

City approved the Ordinance. The Ordinance, which is incorporated herein by reference, provides for a ceiling of 75% of the increase in the Consumer Price Index on annual rent increases on leases for mobilehome spaces. The Ordinance provides for administrative claims for unlawful increases to the Mobilehome Fair Practices Commission ("the Commission") which is established under the terms of the Ordinance. The Ordinance provides a tenant with the right to $500 statutory damages "if a mobilehome park owner demands, accepts, receives or retains any space rent payment" in excess of the amount allowed under the Ordinance plus attorneys fees and expenses. Tenants are also permitted to pursue any other lawful remedy, including injunctive relief.

8. As of June 1983, Cathedral City had four vacant spaces for lease

to mobilehome owners out of a total of 1,619 mobilehome spaces offered for residential lease or month-to-month rental, resulting in a total vacancy rate of 0.24%.

9. On or about March 25, 1983, despite passage of the Ordinance, attorneys for Defendants informed residents of Royal Palms that Defendants were demanding a rent increase of 12% per annum and three year leases (a 40% compounded rent increase over the three years). At the same time, the Defendants, through their attorneys, gave residents 60 days' notice under the California Mobilehome Residency Law (California Civil Code Section 798 et seq.) that residents would be liable for the 12% per annum rent increase. The Defendants, through their attorneys, further stated that if residents refused to sign leases reflecting the

12% per annum rent increase, residents would be forced to assume month-to-month tenancies. Later, prior to the filing of this action, Defendants refused to give assurances upon request by Plaintiffs' counsel that the Defendants would not evict tenants who refused to pay the demanded rent increases and were placed on month-to-month tenancies.

10. On April 20, 1983, Plaintiff Jack Zachary filed a petition under the Ordinance with the Commission. Mr. Zachary requested relief from Defendants' threatened rent increases and asserted that the demanded rent increase by the Defendants was in violation of the Ordinance. A hearing on that petition was held on May 23, 1983, at which time the Commission ruled that the demanded rent increases were twenty times that allowed under the Ordinance and in violation of the

Ordinance. Nevertheless, the Commission decided that it would abstain from making a final decision with regard to Defendants' demanded rent increases pending judicial determination of Defendants' claim of federal preemption.

11. On May 23, 1983, Plaintiffs Jack Zachary, Anne Zachary, Maud Sermuks, Thelma Cain and Bruce Fisher, filed in this Court a Verified Complaint for Declaratory Relief; Injunctive Relief; Statutory Damages; Tortious Interference with the Privilege of Suffrage; Negligent Misrepresentation; Fraud; Rescission; Negligent Infliction of Emotional Distress; and Intentional Infliction of Emotional Distress against Allan Wilk, Royal Palms Mobile Home Park, Ltd., and Does I through XX. The Verified Complaint was filed on behalf of a class which included Plaintiffs and all of the persons who reside at Royal Palms. In

addition, Plaintiffs' Fifth, Sixth and Seventh causes of action were brought by Plaintiff Bruce Fisher on behalf of a subclass of the Plaintiff Class, referred to as the "Fisher Subclass." The Fisher Subclass is composed of approximately 25% of the residents of Royal Palms who signed leases prior to the date of passage of the Ordinance for terms extending past the effective date of the Ordinance. The Fisher Subclass alleges in the Verified Complaint that its members signed leases based upon unlawful and coercive threats and fraudulent misrepresentations by Defendants.

12. On May 23, 1983, Plaintiffs also filed with this Court an Application for an Order to Show Cause Why Preliminary Injunction Should Not Issue and for a Temporary Restraining Order. Later that same day, Defendants, relying upon purported claims of federal

preemption, removed the case to the United States District Court for the Central District of California. On May 25, 1983, a hearing was held before United States District Judge William Matthew Byrne, Jr. on Plaintiffs' Ex Parte Application for an Order Shortening Time to Hear a Motion to Remand, or in the Alternative, for a Temporary Restraining Order and an Order to Show Cause Why a Preliminary Injunction Should Not Issue. At that hearing, Judge Byrne asked the parties, and in particular the Defendants, if they would stipulate to what amounted to an injunction against imposition of the rent increases pending disposition of the issues raised with respect to remand to state court. The parties so stipulated and an Order to that effect was issued by Judge Byrne.

13. On June 6, 1983, Plaintiffs' Motion to Remand came on for hearing

before Judge Byrne. At that hearing, Judge Byrne rejected Defendants' assertion that they were entitled to federal jurisdiction based upon their claims of federal preemption. The Court then took the matter under submission for the preparation of an order remanding the case back to state court. The order remanding the case to this Court was issued by Judge Byrne on September 16, 1983. The stipulated freeze on rent increases remained in effect pending decision by this Court.

14. Pursuant to stipulation of the parties, on October 13, 1983, Plaintiffs filed their Notice of Motion and Motion for Preliminary Injunction and supporting declarations. On October 21, 1983, Defendants filed their Memorandum of Points and Authorities in Opposition to the Motion for a Preliminary Injunction, along with supporting declarations. On

October 27, 1983, Plaintiffs filed their Reply to Defendants' Opposition. After the hearing in this matter on October 28, 1983, Plaintiffs and Defendants also supplied the Court with supplemental written arguments.

15. On November 10, 1983, after consideration of the pleadings and files and other evidence, including evidence presented by declaration and otherwise by both parties, which is admitted as part of the record herein, the Court granted Plaintiffs' Motion for Preliminary Injunction as to those residents who did not sign leases prior to the effective date of the Ordinance. Prior to the hearing on their Motion for Preliminary Injunction, Plaintiffs withdrew their claim for a preliminary injunction on behalf of the Fisher Subclass without waiver of any rights with respect thereto.

16. The Court granted Plaintiffs' Motion based upon a preliminary finding of Plaintiffs' strong probability of success on the merits for the reasons set forth below:

a. The Court rejects Defendants' assertion of federal preemption of the Cathedral City Mobilehome Fair Practices Ordinance because Royal Palms is located on land owned by Indian Allottees. The contractual relationship regulated by the Ordinance is the lease relationship between the non-Indian Defendant-landlords and their non-Indian Plaintiff-tenants. As the above findings note, ante at Paragraph 4, a separate assignment exists between the Defendants and the Indian Allottees under which the Defendants use the land in return for a minimum lump sum payment and a percentage of receipts payment to the Allottees. While the

assignment is regulated by federal law insofar as its terms are subject to approval by the Bureau of Indian Affairs, the lease relationship regulated by the Ordinance is not.

1. In this case, to be preempted by federal law, regulation of the lease relationship between Plaintiffs and Defendants would have to intrude on tribal government. This is the meaning of the cases cited and relied upon by Defendants, which involved Indian tribes having a direct economic and/or contractual relationships with non-Indians and acting as entities separate and apart from individual Indian Allottees. See, e.g., White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980) (direct contractual relationship between a non-Indian logging company and White Mountain Apache Tribe, from which 90% of tribe's revenues derived); McClan-

ahan v. Arizona State Tax Comm'n, 411 U.S. 164 (1973) (tribal claims regarding dealings between reservation Indians and non-Indian traders); Central Machinery Company v. Arizona State Tax Comm'n, 448 U.S. 160 (1980) (contractual relationship between Gila River Indian Tribe and non-Indian corporation); Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973) (tribal-owned ski resort contesting direct imposition of state tax); Crow Tribe of Indians v. State of Montana, 650 F.2d 1104 (9th Cir. 1981), cert. denied, _____ U.S. _____, 103 S.Ct. 230 (1982) (tribal lease agreements for mineral rights); Eastern Band of Cherokees v. North Carolina Wildlife, 588 F.2d 75 (4th Cir. 1978) (tribal suit regarding fishing rights held by tribe). The Court finds, however, that there is no interference with, much less intrusion upon, tribal government in this case. The Agua Caliente Tribe

cannot claim any direct or indirect contractual or economic interest in the application of the Mobilehome Fair Practices Ordinance to Royal Palms.

2. Tribal government could be implicated in this case only if the Tribe itself claimed that imposition of the Ordinance to Royal Palms somehow imperiled "the subsistence or welfare of the tribe." Montana v. United States, 450 U.S. 544, 566 (1981); see also, Santa Rosa Band of Indians v. Kings County, 532 F.2d 655 (9th Cir. 1975), cert. denied, 429 U.S. 1038 (1977). The Court finds, however, that no such claim could be made in this case. The Allottees, whose interest in the land is "the virtual fee . . . with certain restrictions on the right of alienation," United States v. Oklahoma Gas & Electric Co., 127 F.2d 349, 352 (10th Cir. 1942), aff'd, 318 U.S. 206 (1943);

25 U.S.C. Section 331, receive a return on their land under terms of an assignment which has already been approved by the BIA. The Ordinance has no "subsistence" effect on the tribe itself. Indeed, the Declaration of Barbara Gonzales, the Chair of the Tribal Council, which was submitted by the Defendants, makes no such claim.

3. Finally, to the extent that the Ordinance impacts the Indian Allottees' economic return on their land, the Court finds that, under the governing federal precedents, the effect is only indirect, incidental, and remote and is therefore no bar to the imposition of the Ordinance on Royal Palms. The Ordinance is only one of many market forces affecting the ultimate value of the Allottees' assignment by virtue of the provision for a percentage return contained in that assignment. However, even if the

complete absence of Bureau of Indian Affairs jurisdiction were deemed absolutely irrelevant, and even if tribal sovereignty were somehow implicated (neither of which is the case), the effect on Indian land is so indirect that it could never warrant federal preemption. Indeed, the two Indian Allottees in the case (Ruth Elaine Patencio and Debrah Gonzales Purnel) have informed the Court that they do not object to imposition of the Ordinance on their land.

The proposition that indirect effects on Indian land are permissible is a cornerstone of federal Indian law. In Santa Rosa Band of Indians v. Kings County, supra, the Ninth Circuit construed 28 U.S.C. Section 1360 and 25 C.F.R. Section 1.4, both of which deal with local jurisdiction over Indian land, and expressly rejected federal preemption of local "regulations of

activity which only incidentally involve [Indian] property." 532 F.2d 667 n.20. Similarly, in Fort Mojave Tribe v. San Bernardino County, 543 F.2d 1253 (9th Cir. 1976), cert. denied, 430 U.S. 983 (1977), the court upheld imposition of a possessory interest tax on non-Indian lessees of trust land. In so doing, the Ninth Circuit considered and rejected the effect of the tax as insufficient to trigger federal preemption, noting that "the only effect of the tax on the Indians [would] be the indirect one of perhaps reducing the revenues they will receive from the leases as a result of their inabilty to market a tax exemption." Id. at 1258. The Court finds that, at best, only the same indirect and incidental effect exists here. Therefore, this Court can no more permit the marketing of an exemption from rent control in this case than could the court permit an analogous

marketing of a tax exemption in Fort Mojave.

b. The Court also rejects Defendants' affirmative defense that the Ordinance is unconstitutional and otherwise unlawful under Birkenfeld v. City of Berkeley, 17 Cal.3d 129, 130 Cal.Rptr. 465 (1976). Contrary to Defendants' arguments, the evidence they themselves have offered demonstrates that the vacancy rate in Cathedral City is approximately 0.24%, a rate which clearly demonstrates that a housing shortage exists in Cathedral City (the vacancy rate in Birkenfeld was a "low" 3.0%). Defendants' contention that Cathedral City cannot consider only its own shortage, but must also take into consideration the vacancy rate in the 12-square mile area in and around Palm Springs, was specifically rejected in Birkenfeld. There, the Supreme Court held that "the

availability . . . of housing in adjoining cities [does not] detract[] from Berkeley's power to safeguard and promote the health and welfare of persons who choose to live in that city." 17 Cal.3d at 163, 130 Cal.Rptr. at 489-490. Moreover, the Ordinance meets all the other constitu- tional and legal standards established in Birkenfeld, and in the subsequent cases of Fisher v. City of Berkeley, Sup.Ct. No. S36602-6 and Cotati Alliance For Better Housing et al. v. City of Cotati, Sup.Ct. No. 108247 submitted by Defendants to this Court on November 2, 1983.

c. Finally, the Court also rejects Defendants' claim that the Ordinance is preempted by state law. The Ordinance does not conflict with, and indeed satisfies, the notice requirements of the Mobilehome Residency Law, California Civil Code,

Section 798 et seq. Section 798.30 requires notice of a rent increase "at least 60 days before . . . the increase." The Ordinance provides for 90 days' notice, which is obviously "at least" 60 days. In addition, the Court finds that provision for rent increases at a rate which is 75% of the CPI, combined with the Ordinance's simple procedure for hardship adjustment, permits a landlord to earn a fair rate of return.

d. The Court rejects Defendants' assertions that Plaintiffs are not entitled to injunctive relief. Defendants have asserted that all injunctive relief should be denied because the "Fisher subclass" who signed their leases before enactment of the Ordinance have claims which are subject to factual dispute. However, Plaintiffs have withdrawn their request for preliminary injunctive relief as to

the Fisher subclass at this time. Their request, therefore, is limited to those residents who had not signed three-year leases as of the effective date of the Ordinance on March 25, 1983. As to those Plaintiffs, however, it is well settled that since the Ordinance itself specifically authorizes injunctive relief, Plaintiffs need not separately prove irreparable harm or satisfy the other equitable criteria for such relief. Porter v. Fiske, 74 Cal.App.2d 332, 171 P.2d 971 (1946); People v. Mel Mack Company, 53 Cal.App.3d 621, 126 Cal.Rptr. 505 (1975); Paul v. Wadler, 200 Cal.App.2d 615, 26 Cal.Rptr. 341, 347 (1962). It is irrelevant, moreover, that other forms of relief may be available. In Porter v. Fiske, supra, and People v. Mel Mack Company, supra, both damages and injunctive relief were available. Nevertheless, the violation of a statute itself

providing injunctive relief was deemed sufficient in those cases to award such relief absent any demonstration of compliance with traditional equitable criteria. Finally, even if irreparable injury must be proved, Plaintiffs have presented substantial evidence on the record that residents of Royal Palms would be subject to irreparable injury if the Ordinance is not enforced because the rent increases have a substantial adverse impact on their economic interests.

17. No bond is required. Plaintiffs have demonstrated, based upon a balancing of the hardships, that a bond requirement would adversely affect the financial welfare of residents of Royal Palms and would disrupt the status quo.

Based upon the foregoing determinations, Plaintiffs' Verified

Complaint, supporting evidence, the Memorandum of Points and Authorities and all pleadings and other documents on file in this action, and after a hearing on the merits, and it appearing from these that this is a proper case for issuance of a Preliminary Injunction, and it further appearing that Plaintiffs will suffer irreparable injury if a Preliminary Injunction does not issue, the Court enters the following orders:

1. The Motion for Preliminary Injunction brought by Plaintiffs on behalf of all residents of Royal Palms, excluding those residents who are members of the Fisher Subclass as defined above, is granted. The Plaintiff class includes all those persons who had not entered into written three-year lease agreements prior to March 25, 1983.

2. Defendants Allan Wilk and Royal Palms Mobile Home Park, Ltd., their agents, officers, employees, representatives, successors in interest and assigns, and all persons acting in concert or participating with them, are enjoined from engaging in or performing any of the following acts:

a. Defendants are enjoined from imposing rent increases at Royal Palms in excess of the amount allowed under the Cathedral City Mobilehome Fair Practices Ordinance and are enjoined from offering residents of Royal Palms leases and services on terms and conditions other than those currently offered to residents, with the exception of allowable rent increases under the terms of the Cathedral City Mobilehome Fair Practices Ordinance.

b. Defendants are enjoined from engaging in retaliatory evictions of residents of Royal Palms and other retaliatory acts against residents under the Cathedral City Mobilehome Fair Practices Ordinance.

3. Plaintiffs are not required to post bond.

DATED: January 12, 1984

/s/ Warren E. Slaughter
Judge of the Superior Court

Filed August 21, 1985

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JUAN SEGUNDO, JR., ET AL., Plaintiffs, v. CITY OF RANCHO MIRAGE, Defendant.	NO. CV 82-4338 AAH (Mcx)
JEANE CHORMICLE KAPP, ETC., ET AL., Plaintiffs, v. CITY OF CATHEDRAL CITY, ETC., ET AL., Defendants.	NO. CV 84-3678 AAH (Mcx) FINDINGS OF FACT AND CONCLUSIONS OF LAW

These cases, which were consolidated, came on for trial and the Court, having heard the evidence, and having considered the admitted facts as set forth in the Pre-Trial Conference Order, and the briefs of the parties, finds the facts and states the conclusions of law as follows; after

full consideration of plaintiffs' objections and defendants' response thereto:

1. The Court has jurisdiction and venue.

2. The Court agrees with the admitted facts as set forth in the Pre-Trial Conference Order as follows:

(a) Plaintiffs Jeane Chormicle Kapp, Lisa Bliele, Paula Bleile, Juan Segundo, Jr., Lucille Bow, Diana Bow, Edmund Siva, Barbara Gonzales and Debrah Gonzales (hereinafter "plaintiff allottees") are enrolled members of the Agua Caliente Band of Cahuilla Indians, a federally-recognized Indian Tribe formerly known as the Agua Caliente Band of Mission Indians. Plaintiff allottees are the beneficial owners of those parcels of real property located

on the Agua Caliente Indian Reservation in Riverside County, California, known as Allotments No. PS (Palm Springs) - 94 (Kapp), PS-28E (Bliele), PS-33E (Segundo), PS-80 (Bow), PS-120 (Siva), PS-92E (Barbara Gonzales) and PS-97E (Debrah Gonzales), fee title to which is held in trust for them by the United States of America pursuant to 25 U.S.C. §§331 et seq., the Mission Indian Relief Act, 26 Stat. 712 (1891) and 25 U.S.C. §§951-958. The portions of said allotments at issue herein are situated within the limits of Rancho Mirage and Cathedral City, California.

(b) Plaintiff De Anza Properties IX is a California limited partnership doing business in Riverside County, California. At all times relevant hereto, plaintiff De Anza Properties IX has been and now is the assigneee and holder of a master lease ("PSL-105") which includes plaintiff

allottees' allotments PS-94, PS-28E, PS- 3E, PS-80, PS-92E, PS-97E and PS-120. All of the allotted lands included in PSL-105 are Indian country within the meaning of 18 U.S.C. § 1151, and are located in Cathedral City and Rancho Mirage, California.

(c) Defendants Cathedral City ("City") and Rancho Mirage are municipal corporations organized and existing under and pursuant to the laws of the State of California. Defendant Cathedral City Mobilehome Fair Practices Commission ("Commission") was established pursuant to Cathedral City Ordinance No. 48, an initiative ordinance enacted by a majority of the voters of the City of Cathedral City voting thereon at a special election held on March 8, 1983, and considered by the City to be effective March 15, 1983.

(d) On December 12, 1967, plaintiff allottees, acting through the then-guardians or representatives of their respective estates, entered into a written business lease with the predecessor of plaintiff De Anza Properties IX. That lease, known as PSL-105, included portions of the above-mentioned Allotments comprising a total of 242.596 acres located in Riverside County, California; approximately one-third of the area under the lease is within the limits of defendant Rancho Mirage, and two-thirds is within the limit of defendant Cathedral City.

(e) PSL-105 is for a term of 65 years from July 2, 1968, the date upon which the lease was approved by the duly-designated representative of the Secretary of the Interior of the United States (hereinafter "Secretary"). The lease provides that

the lessee is to pay to plaintiff allottees a guaranteed minimum annual rental, plus the difference between said minimum annual guaranteed rental and the sum of various precentages of the business activities operated on the leased premises. The lease provides that lessors shall receive 15% of the gross receipts from the rental or subleasing of mobilehome or trailer spaces. All revenues due lessors under the lease are to be divided among them in proportion to their respective ownership interests in the leased premises, without regard to ownership or location of the land upon which particular business activity occurs.

(f) The original PSL-105 was modified on November 20, 1970, and January 14, 1977, by two written agreements between lessors and lessee; said modifications were approved by the Secretary's authorized

representative. The first of these modifications altered the rent due from the sale of mobile homes on the leased premises. The second of these modifications reduced the area included in PSL-105 from 252.596 acres to 236.546 acres.

(g) In 1977, all interest in PSL-105 was assigned to plaintiff De Anza Properties IX with the approval of the Indian lessors and the Secretary. Since then, plaintiff De Anza Properties IX has been and now is the lessee of all of the 236.546 acres of real property included in the lease.

(h) Since acquiring the lease in 1977, plaintiff De Anza Propeties IX has operated and now operates on the leased premises a rental mobile home park, together with various recreational facilities.

(i) When plaintiff De Anza Properties IX acquired PSL-105 in 1977, said plaintiff reviewed the rent structure then in effect in the mobile home park to determine what it considered to be uniform fair base rents for the spaces therein, according to what it considered to be prevailing market conditions and the space size and location. Pursuant to this review, plaintiff De Anza Properties IX proceeded to establish and apprise the park's residents of the new base rents, and to advise said residents that upon expiration of existing subleases, new subleases could be executed based upon the predetermined base rents; however, the new base rent structure did not change rents in effect under any existing rental agreements during the unexpired terms thereof.

(j) Each year since 1977, plaintiff De Anza Properties IX

has determined what it considers to be the current fair market rents for the spaces in the park, has apprised every sublessee of the redetermined base rent for his/her space and has offered every sublease at the new base rent which would assure that rent would not be increased more than once per year, nor in an amount in excess of any increase in the National Consumer Price Index plus tax and utility increases. Some tenants have been dissatisfied with such increases. Since 1977, plaintiff De Anza Properties IX has refrained from increasing rents for mobilehome spaces under leases beyond increases in the National Consumer Price Index. For spaces not under leases, rents have been increased to what plaintiff De Anza Properties IX has determined to be the fair market rental; in some cases, those increases have exceeded increases in the National Consumer Price Index.

(k) In a special election held in the city of Cathedral City on March 8, 1983, a majority of the voters approved Ordinance No. 48. Said Ordinance, inter alia, established defendant Mobilehome Fair Practices Commission; set base rents for determining future rent increases as the rents in effect on March 1, 1982 (subject to certain exceptions); limited the annual rent increase for any mobile home space in the city to a maximum of three-fourths of the increase in the cost of living as indicated in the U.S. Department of Labor's Consumer Price Index for the Los Angeles-Long Beach-Anaheim Metropolitan Area, except for hardship adjustments granted by the Commission on application and proof by the mobilehome park owner; established requirements for notice of rent increases and excused non-payment of such increases not preceded by

requiring notice; prohibited reductions in services to mobilehome spaces without passing through reductions in the costs of such services; authorized the imposition of fees on mobilehome park owners to defray the costs of the Commission's operations; provided that a mobilehome park resident may sue a mobilehome park owner for damages, civil penalties and attorneys' fees for demanding, accepting, receiving or retaining any rent payment in excess of the amounts permitted under the Ordinance; made non-compliance with the maximum rents permitted under the Ordinance a defense in an action for injunctive relief to prevent or remedy any violation of the Ordinance; imposed upon the mobilehome park owner the burden of proof of sustaining any rent increases; made resort to the Commission a mandatory condition precedent to seeking judicial relief; and provided that the prevailing party

in any action to challenge the validity of the Ordinance or any part thereof shall be entitled to the award of reasonable attorney's fee.

(l) On or about May 4, 1982, the electorate of the City of Rancho Mirage, by initiative ordinance, passed Measure A, "An Ordinance of the City Council of the City of Rancho Mirage Establishing a Mobile Home Fair Practices Commission and Repealing Ordinances No. 218 and 222." Measure A imposes rent controls on all mobile home parks and mobile home park spaces located within the City. After May 1, 1982, no mobilehome park owner who leases or rents an affected space can raise the rental rate of that space by an amount in excess of 75% of the increase in the Los Angeles-Long Beach-Anaheim Consumer Price Index during the year preceding that rental rate increase. If a space lessor intends to

increase the space rental by any amount, he must give 90 days' notice to the affected space renter. The rent controls apply to all spaces not under lease on or after May 1, 1982. Section 16 of Measure "A" declares void ab initio any lease executed after the effective date of the ordinance (May 1, 1982) whereby the tenant and the landlord agree to modify or waive any right granted by the ordinance.

(m) Any owner of an affected mobilehome park space who charges more than the permissible rent can be sued in state court or brought before Rancho Mirage's Mobilehome Fair Practices Commission. The tenant bringing the action may recover all space rents in excess of the amounts permitted by the ordinance, as well as a civil penalty of $500 per violation and reasonable attorney's fees. A renter of an affected space may defend

an unlawful detainer action for nonpayment of rent on the ground that the rent sought is in excess of the space rent allowed by the ordinance.

(n) Measure "A" also forbids all mobilehome park owners from reducing or eliminating services to mobilehome park spaces unless any such reduction is accompanied by a decrease in the space rental which is proportionate to the cost savings derived by the lessor. Measure "A" is effective from May 1, 1982, until no longer seemed [sic] necessary by the City Council of Rancho Mirage and a majority of the voters of the City.

(o) Plaintiff De Anza Properties IX has apprised the residents under lease of its mobilehome park on PSL-105 of space rent increases limited to the percentage increase in the National Consumer Price Index, plus

what De Anza Properties IX considers to be unavoidable tax and utility increases.

(p) In response to plaintiff De Anza Properties IX's notification, seven residents of the Cathedral City portion of plaintiff De Anza Properties IX's mobilehome park petitioned defendant Cathedral City Mobile Home Fair Practices Commission for an interpretation that said increases would exceed the minimum permissible increases under Ordinance No. 48. Plaintiff De Anza Properties IX appeared before defendent [sic] Commission and contended that its mobilehome park is exempt from application or enforcement of Ordinance No. 48 because the application of said Ordinance to lands held in trust for Indians by the United States and leased from said Indians with the approval of the Secretary of the Interior pursuant

to federal statutes and regulations is inconsistent with and preempted by the Constitution, laws and regulations of the United States, and would deprive plaintiff De Anza Properties IX and the Indian allottees whose land is included within PSL-105 of the equal protection of the laws and rights, privileges and immunities protected and secured under the Constitution and laws of the United States.

(q) In response to the petition received from tenants of plaintiff De Anza Properties IX's mobilehome park, Defendant Commission issued Ordinance Interpretation No. 84-2, which stated that the maximum permissible rent increase which plaintiff De Anza Properties IX may require of the residents of its mobilehome park located on PSL-105 between March, 1982 and January, 1984 is 3.32%; that Ordinance No. 48 is

applicable to plaintiff De Anza Properties IX's operation of its mobilehome park on PSL-105 pursuant to the decision of the Superior Court for the County of Riverside in Zachary v. Wilk; and that the rent increase which plaintiff De Anza Properties IX would require of its tenants exceeds the maximum permitted under said Ordinance.

3. The Court finds that the expert called on behalf of defendants has more credibility with respect to the points at issue than the experts called on behalf of the plaintiffs.

4. The issues are as follows:

(a) Are plaintiffs in either case entitled to declaratory relief of the kind sought; and

(b) Are plaintiffs in either case entitled to an injunction of the kind sought; and

(c) Are plaintiffs in either case entitled to any damages of the kind sought.

5. The Court concludes that none of the plaintiffs are entitled to declaratory relief because the mobilehome rent control ordinances at issue here, City of Rancho Mirage Measure A [Exhibit 29] and City of Cathedral City Ordinance No. 48 [Exhibit 12] (hereinafter collectively referred to as "Ordinances"), are constitutional on their face and as applied, for the following reasons:

(a) The ordinances constitute valid exercises of the police power by the defendant Cities

enacted for the general welfare of the community.

(b) The Ordinances are not arbitrary, capricious or unreasonable, either on their face or as applied.

(c) The Ordinances do not unlawfully discriminate or have a discriminatory impact because all mobilehome parks within the defendant Cities are regulated by the Ordinances.

(d) The Ordinances do not regulate PSL-105, the Master Lease between the Indians and the landlord, which through a series of assignments is now plaintiff De Anza Properties IX [Exhibit 8].

(e) The Ordinances regulate only non-Indians and the dealings between and by non-Indians, specifically the charge of rents to

tenants in mobile home parks within the boundaries of the Cities and the federal statutes and regulations cited by plaintiffs do not preclude application of the Ordinances to the De Anza Park.

(f) None of the cases cited by plaintiffs as their leading authorities require a contrary conclusion. Bryan v. Itasca (1976) 426 U.S. 373; United States v. County of Humboldt (9th Cir. 1980) 615 F.2d 1260; People ex rel. Dept. of Transportation v. Naegle Outdoor Advertising Co. (1985) 38 Cal.3d 509; Barona Group of the Capitan Grande Band of Mission Indians v. Duffy (9th Cir. 1982) 694 F.2d 1185 and Santa Rosa Band of Indians v. Kings County (9th Cir. 1976) 532 F.2d 655, all involved direct regulation of Indians on Indian land or of the Indian land itself. As the Santa Rosa case recognized, where the

regulation is of activities of or dealings between non-Indians, even though they take place on Indian land, the regulation is lawful.

(g) The Court finds on the evidence adduced that the Ordinances have not and will not significantly impact the Indian allottees.

(h) The plaintiff Indian allottees hold their interests in the land under trust patents from the United States. These trust patents were issued October 12, 1961, and by their terms expire in 25 years, that is on October 11, 1986 [Exhibits 1-7]. Under federal law, 25 U.S.C. §349, when the trust patents expire, the lands are conveyed to the Indians by patent in fee, and at that time, "each and every allottee shall . . . be subject to the laws, both civil and criminal, of the State. . . ."

(i) Section 2.C of both Ordinances are identical. That subsection provides as follows:

> "Nothing in this Ordinance shall apply to any rental increase agreed to in a lease or to any extension or renewal of an existing lease between a mobile-home park owner and a resident of the park."

(j) At the time both Ordinances were adopted and became effective, the following subleases were in effect: (1) 397 subleases which provided for an 8-year term, with two, two-year extensions, and which were entered into sometime after the Master Lease was executed in December, 1967, by De Anza's predecessor-in-interest, Palm Springs Mobile Home Country Club [Exhibit 107; Court's Exhibit 6]

(hereinafter referred to as "Packard Form No. 1"); (2) 26 subleases which provided for an 8-year term and which were entered into sometime after the Master Lease was executed in December, 1967, by De Anza's predecessor-in-interest, Palm Springs Mobile Country Club; (3) 98 subleases which provided for a term of 5 years and which were entered into by De Anza after it assumed operation of the park on or after 1977 [Court's Exhibit 7] (hereinafter referred to as "Packard Form No. 2"); (4) 17 spaces were rented under month-to-month tenancies.

(k) At the present time, the 397 long-term subleases (Packard Form No. 1) are still in effect--394 will expire in July, 1987, 3 will expire in October 1988 and 2 will expire in November 1988; 15 five-year leases (Packard Form No. 2) are in effect and

126 spaces are rented under month-to-month tenancies.

(l) Under California state law governing tenancies in mobilehome parks, as set forth in California Civil Code Sections 798-799.6, the Mobilehome Residency Law, and Civil Code Sections 1940-1954.1, which laws are summarized accurately in 4 Miller & Starr, Current Law of California Real Estate (1971 ed.) and in the 1977 edition of that book at Sections 27.13, 27.29-27.36, inclusive, and 29.1-29.73, inclusive, the subleases and month-to-month tenancies in existence at the time the Ordinance became effective may be extended or renewed, and in some cases, have been extended by the tenant remaining in possession with the consent of the landlord.

(m) Under state law, if the landlord does not notify the tenant

that the tenancy is terminated, then the consent of the landlord to the holding over by the tenant is implied.

(n) Under the Mobilehome Park Residency Law, mobilehome park tenancies, whether for a fixed term or month-to-month, may be terminated and a failure to renew a tenancy justified, only for specified authorized reasons and by following specified procedures as set forth in that law.

(o) Similarly, under State law governing hiring of real property, if a tenant holds over with the consent of the landlord, whether the tenancy be for a fixed term or month-to-month, the tenancy has not terminated. If the tenant stays in possession with the consent of the landlord, whether implied or express, there is an extension of the lease, so long as the tenant continues to pay the rent, even

though it may be paid or accepted under protest; if a new agreement is entered into which is substantially similar to the terms of the previous tenancy, then a renewal of the tenancy occurs.

(p) When and as the term of the subleases expired and expire, De Anza had and has the power to extend leases and/or renew tenancies, in which case the Ordinances, pursuant to Section 2.C, do not apply.

(q) Under the Court's construction of Section 2.C De Anza could take affirmative action to extend or renew the existing leases when their terms expire.

(r) If new agreements are entered into which differ substantially from the terms of the prior leases, then they would not constitute

extensions or renewals and the Ordinances would apply.

(s) None of the plaintiffs have applied for a hardship increase as they are permitted to do under the Ordinances.

6. The Court concludes that none of the plaintiffs are entitled to an injunction because the Ordinances are constitutional on their face and as applied and as the Court has interpreted subsection 2.C of the Ordinances the existing leases may be extended or renewed at the appropriate time.

7. The Court concludes that none of the plaintiffs are entitled to damages because plaintiffs have failed to show adverse impact on the Indian allottees. Further, almost three-quarters of the 538 spaces in the De

Anza park are occupied pursuant to long-term leases which have not yet expired, nor will expire until July, 1987, and October and November 1988. The Ordinances have no effect on these leases pursuant to subsection 2.C of the Ordinances. With respect to the remaining spaces, under State law, the tenants which have remained in possession after expiration of former leases remain as month-to-month tenants under lease extensions. As the Court interprets State law and the Ordinances, De Anza has the power to renew tenancies by offering a new agreement not substantially different from the old lease agreements.

DATED: August 21, 1985

/s/
A. ANDREW HAUK
Senior Judge of the
United States District Court